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SUPREME COURT OF THE UNITED STATES

(3)

NO. 92-5129

OCTOBER TERM, 1992

JOHN L. SULLIVAN
PETITIONER

Versus

STATE OF LOUISIANA
RESPONDENT

On Petition For A Writ Of Certiorari
To The Supreme Court
Of The
State of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, the State of Louisiana, opposes the granting of the writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Louisiana which, on petitioner's direct appeal, affirmed petitioner's conviction of first degree murder.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner John L. Sullivan was convicted of first degree murder and sentenced to death after a trial in which the jury's instruction on reasonable doubt during the guilt phase of the trial was constitutionally deficient under the standard of Cage v. Louisiana, 111 S.Ct. 328 (1990) (per curiam). On direct appeal the Supreme Court of Louisiana affirmed the conviction on March 2, 1992, holding that the instruction on reasonable doubt, though admittedly erroneous, was harmless error. State v. Sullivan, 596 So.2d 177 (La. 1992). The Court also found that petitioner's trial counsel was ineffective in the penalty stage of the trial, and therefore vacated the sentence and remanded for a new sentencing hearing. Applications for rehearing by petitioner and respondent were denied by the Louisiana Supreme Court on April 9, 1992.

B. Statement of the Facts:

A complete statement of the facts of the offense in this case is included in the opinion rendered by the Louisiana Supreme Court. State v. Sullivan, 596 So.2d 177 (La. 1992). Briefly, petitioner was convicted of shooting to death a patron of a New Orleans bar during a robbery attempt. Petitioner was identified at trial by the co-perpetrator of the robbery, Michael Hillhouse, as the trigger-man. A bar maid "positively identified Hillhouse and Sullivan in court as the persons who had committed the armed robbery at the C-Note Lounge. She stated she did not see who had

shot King [the victim], but after she heard the shot, she ducked down behind the bar before looking up to see what had happened. She testified she saw Sullivan holding a shotgun to a customer's head." State v. Sullivan, supra, at 180.

Petitioner, after shooting the patron with a shotgun, brought the co-perpetrator to his girlfriend's apartment, where he left the shotgun, clothing, and a watch taken from a customer. The two perpetrators were arrested while on a drinking spree a few hours later when police identified them from descriptions given by surviving patrons of the bar. At trial the barmaid identified a jacket taken from the girlfriend's apartment as the jacket worn by petitioner at the time of the murder. State v. Sullivan, supra, at 180.

A ballistics expert at trial identified a shotgun found at the girlfriend's apartment as the one which fired the shot that killed the victim. The Louisiana Supreme Court noted that "the testimony of Hillhouse [the co-perpetrator] fingering Sullivan as the leader and triggerman remains unrefuted, ...", and that in addition to the testimony of the barmaid, "other evidence, albeit circumstantial, corroborates Hillhouse's version of the facts. The murder weapon, the flight bag, and the suit jacket worn by Sullivan during the crime were later found at the apartment shared by Sullivan and Wold [Sullivan's girlfriend]. It was to this apartment that Sullivan had brought Hillhouse to meet his 'wife' the morning of the murder." State v. Sullivan, supra, at 186.

The Louisiana Supreme Court concluded that "In light of this evidence, the impact of the erroneous instruction could not have affected the jury's deliberation as to Sullivan's guilt." State v. Sullivan, supra, at 186. Because the Court found trial counsel to be ineffective during the penalty phase of the trial it did not analyze the jury charge during the penalty phase but remanded the case to the trial court for a new penalty hearing.

REASONS FOR NOT GRANTING THE WRIT

Petitioner Sullivan has petitioned this Court to decide whether a reasonable doubt jury instruction, which is constitutionally deficient under Cage v. Louisiana, 111 S.Ct. 328 (1990), is subject to a harmless error analysis. Respondent submits that this case does not present a substantial federal question, for two reasons. First, the standard for review of ambiguous jury instructions used in Cage was subsequently disapproved by this Court. Estelle v. McGuire, 112 S.Ct. 475 (1991), 482 n. 4. Thus, there should be no cases in the future in which the harmless-error rule will be applied to cases in which jury instructions have been found deficient under the Cage standard. Second, the previous decisions of this Court indicate that a constitutional error in jury instructions on reasonable doubt may be subjected to a harmless-error analysis under Chapman v. California, 87 S.Ct. 824 (1967). Harmless error review may be applied to "...errors that may have affected either the instructions the jury heard or the record it considered..." Rose v. Clark, 106 S.Ct 3101 (1986), at 3108 n. 11.

I.

THE STANDARD FOR REVIEW OF AMBIGUOUS JURY INSTRUCTIONS USED IN CAGE V. LOUISIANA HAS BEEN DISAPPROVED BY THIS COURT.

This Court in Cage v. Louisiana held that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. Cage, 111 S.Ct., at 330. In Estelle v. McGuire, 112 S.Ct. 475 (1991), the Court established the "reasonable likelihood" standard as appropriate for review of ambiguous jury instructions:

> "[I]n reviewing an ambiguous instruction such as the one at issue here, we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."
> Id. at 482

This Court acknowledged that language in Cage might be read as endorsing a different standard of review for jury instructions, and held that "we now disapprove the standard of review language in Cage and Yates [v. Evatt, 111 S.Ct. 1884], and reaffirm the standard set out in Boyde [v. California], 110 S.Ct. 1190 (1990)." Estelle v. McGuire, 112 S.Ct. 475 (1991), at 482 n. 4.

As a consequence of this specific disapproval of the standard of review used in Cage, it is unlikely that reasonable doubt instructions will be judged using that standard. There will be no occasion to consider the harmless-error doctrine in the context of the standard of Cage v. Louisiana. No state court has ruled on the reasonable doubt jury charge in petitioner's case using the "reasonable likelihood" standard of Boyde and McGuire. The state submits that both Cage and petitioner's case should be reevaluated in light of the new standard of McGuire, since use of

the offending terms "grave uncertainty," "actual substantial doubt," and "moral certainty" may not establish a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. This Court should decline to consider the issue in this case because the issue has not been considered by the highest court of the State of Louisiana.

II.

A CONSTITUTIONAL ERROR IN JURY INSTRUCTIONS ON REASONABLE DOUBT MAY BE SUBJECTED TO A HARMLESS-ERROR ANALYSIS UNDER CHAPMAN V, CALIFORNIA, 386 U.S. 18, 87 S.CT. 824, 17 L.ED.2D 705 (1967).

The well-settled standard of harmless error, as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), focuses on "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Further, "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 23, 87 S.Ct. at 828. While the standard refers to "evidence," it has been applied to jury instructions as well.

In Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), this Court reversed a lower court finding that the harmless error rule could never apply to erroneous jury instructions involving Sandstrom (Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d.39 (1979)) presumptions. The Court noted that "while there are some errors to which Chapman does not apply, they are the exception rather than the rule." 478 U.S. at 578, 106 S.Ct. at 3106. The Court then reviewed the context of the

erroneous instruction and found "the error at issue here--an instruction that impermissibly shifted the burden of proof on malice--is not 'so basic to a fair trial' that it can never be harmless." 478 U.S. at 580, 106 S.Ct. at 3107. Therefore, the Court held "Chapman's harmless-error standard applies in cases such as this one." Later cases of the Court have followed Rose. See Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989); Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987).

Petitioner argues that unconstitutional jury instructions on reasonable doubt may not be subject to harmless error, and cites Rose v. Clark in support of its position. However, the Court in Rose analyzed the question using the query: What is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome? The majority of this Court adopted such an analysis in Rose v. Clark, supra, 106 S.Ct. 3101, at 3108 (footnote 11), and concluded:

> "This [above stated] question applies not merely to Sandstrom violations, but to other errors that may have affected either the instructions the jury heard or the record it considered--including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness. All of these errors alter the terms under which the jury considered the defendant's guilt or innocence, and all theoretically impair the defendant's interest in having a jury decide his case. The dissent's argument--that the Sixth Amendment forbids a reviewing court to decide the impact of a trial error on the outcome....logically implies that all such errors are immune from harmless-error analysis. Yet this Court repeatedly has held to the contrary."
>
> (citations omitted) (emphasis supplied)

This Court has adhered to the harmless-error doctrine as necessary to uphold the "principle that the general purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).

This Court has applied harmless error analysis to a variety of trial errors and has found that most constitutional errors can be harmless. Fulminante v. Arizona, ___U.S.___, 111 S.Ct. 1246, 1263-1264, ___L.Ed.2d___ (1991). Moreover, this Court has viewed errors in jury instructions as trial error and has subjected them to harmless error analysis. See, e.g., Clemons v. Mississippi, 494 ___U.S.___, 110 S.Ct. 1441, 1450-1451, 108 L.Ed.2d 725 (1990) (unconstitutionally overboard jury instructions at the sentencing stage of a capital case); Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); Pope v. Illinois, 481 U.S. 497, 501-504, 107 S.Ct. 1918, 1921-1923, 95 L.Ed.2d 439 (1987) (jury instruction mistaking an element of the offense) Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption); Kentucky v. Warton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (failure to instruct the jury on the presumption of innocence). Thus, there was a substantial basis in this Court's prior decisions for the conclusion of the Louisiana Supreme Court

that an error in reasonable doubt jury instructions is trial error subject to harmless error analysis.

In contrast, a structural defect involves an error that renders the entire trial fundamentally unfair and would not allow a harmless-error analysis. Fulminante v. Arizona, supra; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 439, 71 L.Ed. 749 (1927) (adjudication by biased judge).

In footnote 14 of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Court concluded that cases have indicated that a failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. Id. 443 U.S. at 320. The trial judge in the case now before this Court did not fail to give an instruction on reasonable doubt. An examination of the reasonable doubt instruction shows that the charge did include those elements generally given in such a charge. The problem with the charge was not that no charge was given but that the jury charge included the questioned phrases and concepts of "grave uncertainty," "actual substantial doubt," and "moral certainty," condemned in Cage v. Louisiana, supra. Again, the state emphasizes that up to this point no state court has ruled on whether the inclusion of these phrases would have created a "reasonable likelihood" that a jury would have used an unconstitutional standard in deciding petitioner's guilt. Estelle v. McGuire, supra.

Respondent submits that the Chapman harmless-error rule has been applied to a wide variety of constitutional errors which equally could have affected the finding of an individual juror on

the question of guilt or innocence: Delaware v. Van Arsdale, 106 S.Ct. 1431, 1438 (failure to permit cross-examination concerning witness bias); U.S. v. Hasting, 103 S.Ct. 1974, 1983 (improper comment on defendant's failure to testify); Moore v. Illinois, 98 S.Ct. 458, 466 (admission of witness identification obtained in violation of right of counsel); Milton v. Wainwright, 92 S.Ct. 2174 (admission of confession obtained in violation of right of counsel); Chambers v. Maroney, 90 S.Ct. 1975, (1981) (admission of evidence obtained in violation of Fourteenth Amendment).

Louisiana courts and courts in other states have given jury charges on reasonable doubt similar to the charge condemned in Cage v. Louisiana.

The Cage erroneous jury instruction has been used for years by district courts in Louisiana, and when objected to, its use has been affirmed on appeal. State v. Cage, 554 So.2d 39 (La. 1989); State v. Messiah, 538 So.2d 175 (La. 1988), cert. den., __U.S. __, 110 S.Ct. 880 (1990); State v. Rault, 445 So.2d 1203 (La. 1984); cert. den. 469 U.S., 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); State v. Taylor, 410 So.2d 224 (La. 1982); State v. Monroe, 397 So.2d 1258 (La. 1981), cert. den., 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed 1411 (1982); State v. Stramiello, 392 So.2d 425 (La. 1981); State v. West, 552 So.2d 478 (La. App. 4h Cir. 1989), writ granted, 560 So.2d 33 (1990); State v. Washington, 522 So.2d 628 (La. 4th Cir. 1988); Bently v. State, 523 So.2d 1321 (La. 1988), cert. den. 109 S.Ct. 94, 102 L.Ed. 70 (1988); State v. Miller, 489 So.2d 268 (La. 4th Cir. 1986), writ den., 496 So.2d 1030 (La. 1986).

These charges have been given for decades, and involve unknown thousands of state prisoners. This Court, in Cage, made clear that such charges may not be given in the future, and Louisiana and other states which have previously used this charge will certainly comply with the Cage decision. It is highly likely, however, that in the vast majority of such cases the inclusion of the forbidden phrases had absolutely no effect on the outcome of the trials. Certainly it would be unfair to Louisiana, and to the other states which have used these phrases in their standard jury charges on reasonable doubt, to hold that such jury instructions are inherently prejudicial and may not even be subjected to the harmless-error analysis of Chapman v. California.

The state submits that the Chapman harmless error standard applies in the present case.

III.

THE ERROR IN CHARGING THE JURY REGARDING REASONABLE DOUBT WAS HARMLESS BEYOND A REASONABLE DOUBT.

This Court has held repeatedly that in applying the Chapman rule, the court should review the record in its entirety, quantitatively assessing the evidence before reversing the conviction for constitutional errors that may be harmless. Fulimante v. Arizona, ___U.S.___, 111 S.Ct. 1246, 1264, ___L.Ed.2d___ (1991); Rose v. Clark, 106 S.Ct. at 3106; United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1982). Respondent submits that the facts of this case, as set out

in detail in the opinion of the Louisiana Supreme Court, demonstrate that the erroneous jury charge as to reasonable doubt given in petitioner's case was harmless beyond all reasonable doubt. See: State v. Sullivan, supra, 596 So.2d 177 (1992), at 179-181, 186.

CONCLUSION

This is not an appropriate case for resolution of issues pertaining to a "reasonable doubt" jury charge. The petition for certiorari should be denied.

Respectfully submitted,

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